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No. 93-773

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GEORGE K. PRICE, HARRY L. SCHUMAN
and SHARON ROSEN,

Petitioners,

v.

FCC NATIONAL BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Consumer Credit Protection Act, 15 U.S.C. §1601 *et seq.* (commonly, and hereinafter, referred to as the "Truth In Lending Act"), permits a credit card issuer to tell its cardholders that in order to avoid finance charges payments must be received within 20 days when it has an undisclosed policy of assessing finance charges only if payments are not received within 25 days?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

FCC National Bank ("FCC") issues First Card Visa and Mastercard credit cards.[1] Pursuant to the Agreement between FCC and its cardholders (the "Agreement"), payments are due on or before the Payment Due Date

[1] Pursuant to Supreme Court Rule 29.1, FCC states that it is a wholly-owned subsidiary of First Chicago Corporation.

shown on the billing statement sent to the cardholder monthly. If the bill is not paid in full on or before the Payment Due Date, according to the Agreement, finance charges are charged beginning on the date the purchases were made. If the bill is paid in full on or before the Payment Due Date, the Agreement provides that no finance charges are charged.[2]

The Payment Due Date on each billing statement varies from 20 to 25 days from the billing date. The Payment Due Date for cardholders who have not paid their bills in full ("Partial Paying Cardholders") is 25 days from the billing date; the Payment Due Date for cardholders who have paid their bills in full ("Full Paying Cardholders") is 20 days from the billing date. For the Full Paying Cardholder finance charges are assessed only if payment is not received within 25 days; in other words, there is a five day shadow grace period for Full Paying Cardholders.

The reason for this shadow grace period is not to harm the Full Paying Cardholders, but rather to benefit both them and FCC. Full Paying Cardholders are those who want to avoid finance charges. FCC's practice protects these cardholders from their own inadvertence in mailing their payments a few days late or the vagaries of mail delivery. The practice also greatly reduces cardholder complaints and increases cardholder satisfaction, whilst simultaneously encouraging cardholders to make sure their payments are received timely. For Partial Paying Cardholders, the number of days used in calculating the

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[2] Petitioners refer to this time period during which interest is not charged as the "grace period." Petition For Writ Of Certiorari ("Petition") at 4.

Payment Due Date does not matter because interest is charged from the date of their purchases.[3]

FCC's shadow grace period practice is specifically authorized by the Truth in Lending Act, 15 U.S.C. §1637-(b)(9), and Regulation Z, 12 C.F.R. §226.7(j), promulgated thereunder, and is consistent with the interpretations and opinions of the Federal Reserve Board (the "Board"), the agency charged with the interpretation of the Truth In Lending Act. For this reason the United States District Court for the Northern District of Illinois granted FCC's motion to dismiss and the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court.

REASONS FOR DENYING THE WRIT

I.
THE DECISION BELOW CORRECTLY INTERPRETED THE TRUTH IN LENDING ACT AND REGULATION Z

At issue here is the proper interpretation of section 1637(b)(9) of the Truth In Lending Act and section 226.7(j) of Regulation Z. FCC interprets the Truth In Lending Act and Regulation Z as permitting an undisclosed five day grace period as a matter of business practice. Petitioners interpret it as mandating disclosure of this five day grace period.

In relevant part, section 1637(b)(9) requires a creditor to reveal in its periodic billing statements:

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[3] Contrary to Petitioners' assertion, Petition at 4-5 n.2, FCC does not tell Partial Paying Cardholders they have 25 days to pay their bills without incurring finance charges in order to discourage timely payment.

> The day by which or the period (if any) within which payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

As both the Court of Appeals and the District Court held, section 1637(b)(9) is clear. Section 1637(b)(9) sets forth a general rule in the first clause and an exception to the general rule in the second clause. The general rule requires a credit card issuer to reveal in its periodic billing statements the contractual date on which its cardholders' payments are due. The exception allows the credit card issuer, without disclosure, to forebear from imposing contractually permissible finance charges if its cardholders' payments are received after their contractual due dates.

FCC's challenged practice complies with section 1637(b)(9).[4] FCC informs cardholders who have previously timely paid their bills in full, the Full Paying Cardholders, that they have 20 days within which to pay their bills. Thereafter, FCC unilaterally, and without disclosure, forbears from actually imposing contractually permissible interest charges unless their payments are received more than five days after their due dates.

To reach their contrary construction, Petitioners initially posit that the general rule in the first clause of section 1637(b)(9) does not require a credit card issuer to reveal in its periodic billing statements the date on

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[4] It also complies with Regulation Z which provides in pertinent part: "a creditor may, at its option and without disclosure, impose no finance charge when payment is received after the time period's expiration."

which its cardholders' payments are contractually due. Rather, Petitioners argue, it requires the issuer to reveal the date on which it will actually impose finance charges, taking into account all undisclosed and internal forbearance policies maintained by the issuer. Having construed the first clause so illogically, Petitioners then flounder in their attempt to construe the exception in the second clause of section 1637(b)(9) in a way that makes any sense at all. The construction offered by them is that the second clause only "allows a creditor to waive finance charges actually incurred on a late payment." Petition at 8. Petitioners' construction cannot be correct because under it the exception to the general rule ceases to exist and it is at odds with the plain language of section 1637(b)(9).

As Petitioners concede, under their construction a credit card issuer may only decide to forbear from imposing contractually permissible interest *after* its cardholders' Payment Due Dates have passed. Petition at 8. Yet section 1637(b)(9) states that the "creditor may, at his election and without disclosure, impose no additional finance charge[.]" Impose is the present active form of the verb. Any decision *not to impose* finance charges must necessarily be made prior to the imposition of those finance charges. Petitioners' construction, which requires the reversal of a finance charge previously *imposed*, cannot be correct.

Moreover, under Petitioners' construction, there is never a circumstance under which the card issuer can decide not to impose a finance charge without disclosing its decision. Section 1637(b)(9) allows a credit card issuer not to impose finance charges *without disclosure*. If a credit card issuer may only "waive" previously imposed finance charges in response to cardholder com-

plaints, it is impossible to do so without disclosure. Obviously, the "waiver" must be disclosed to the cardholder. If the card issuer has to tell the cardholder finance charges will be assessed after a certain date, then the card issuer cannot make an undisclosed decision not to impose a finance charge after that date.

Section 1637(b)(9) contains a general rule and an exception. By containing an exception, section 1637-(b)(9) recognizes there will be a situation where disclosure will not be made. Thus, the Court of Appeals correctly interpreted section 1637(b)(9) of the Truth In Lending Act, and the petition for a writ of certiorari should be denied.

II.

DENYING THE WRIT WILL HAVE LITTLE EFFECT AND WILL NOT HARM CONSUMERS

Petitioners also argue that the petition for a writ of certiorari should be granted because once the "decision below becomes known to the industry, it is reasonable to expect that many other bank card issuers will adopt FCC's practice." Petition at 9-10. Central to Petitioners' thesis is that the decision below represents a new interpretation of the Truth In Lending Act. What Petitioners ignore is that the practice complained of is the industry standard, and has been, with the approval of the Board, since at least 1971.

In 1971, section 1637(b)(9) did not contain the exception in the second clause. Instead, it simply contained the general rule in the first clause which required the creditor to reveal: "the date by which, or the period (if any) within which, payment must be made to avoid additional finance charges." In response to a letter asking for clarification regarding whether section 1637(b)(9)

permitted the then widespread industry practice whereby credit card issuers granted their cardholders an undisclosed period within which to pay credit card bills, the Board, in permitting the practice, responded:

> In your letter of April 19, 1971, you inquired whether it would be permissible in an open end credit plan, to disclose under §226.7(b)(9) of Regulation Z the fact that payment in full must be made within 25 days in order to avoid finance charges, when, in reality, the creditor allows a full month from the close of the billing cycle before imposing finance charges.
>
> We believe that it is permissible under Regulation Z to allow an additional grace period beyond the date specified in which to receive payments before a finance charge is assessed. Consequently, the plan you propose would be permissible.

Excerpt from Board Interpretive Letter No. 475, dated May 10, 1971 by Griffith L. Garwood, Attorney, CCH Consumer Credit Guide, ¶ 30,675.

The Truth In Lending Act was amended in 1974. At that time, the exception to the general rule in the second clause was added to section 1637(b)(9). As is required, the Board summarized the amendment in the Federal Register. This summary, which sets forth an example of how section 1637(b)(9) works, says:

> For example, a creditor may disclose that the customer has 25 days in which to pay his account in full to avoid additional finance charges but as a matter of business practice allows [sic] the customer a full 30 days – the beginning of the next billing cycle – to pay the account without the imposition of additional finance charges.

40 Fed. Reg. 1717 (January 8, 1975). Except for the number of days used, this example is exactly the same as FCC's practice.

For twenty-three years the practice such as the one engaged in by FCC has been publicly approved by the agency responsible for administering The Truth In Lending Act. The decision below, which only affirms that policy, is hardly likely to cause much of a stir.[5]

Should the Court of Appeals' judgment be reversed, cardholders will be disadvantaged. It must be remembered that what Petitioners seek to eliminate is FCC's grant of a gratuitous forbearance period. The Court's adoption of Petitioners' interpretation simply means that FCC must eliminate its free forbearance policy and that FCC *must* charge its cardholders interest if their payments are received as little as a day late, unless a cardholder specifically calls up and complains. As the District Court observed, dismissing Petitioners' claim: "[i]t is hard to fathom what Congress' reasoning would have been for such a policy[.]" Petition at Appendix 12.

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[5]The Board's interpretation of section 1637(b)(9) is entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Moreover, contemporaneous administrative construction of a statute is persuasive evidence of its meaning. *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 (1978).

CONCLUSION

The Court of Appeals correctly interpreted the plain language of The Truth In Lending Act. That decision is consistent not only with the purposes behind the Truth In Lending Act but also with the long standing interpretations of the Federal Reserve Board, the agency charged with administering The Truth In Lending Act. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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